

108TH CONGRESS  
1ST SESSION

# S. 413

To provide for the fair and efficient judicial consideration of personal injury and wrongful death claims arising out of asbestos exposure, to ensure that individuals who suffer harm, now or in the future, from illnesses caused by exposure to asbestos receive compensation for their injuries, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

FEBRUARY 13, 2003

Mr. NICKLES introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To provide for the fair and efficient judicial consideration of personal injury and wrongful death claims arising out of asbestos exposure, to ensure that individuals who suffer harm, now or in the future, from illnesses caused by exposure to asbestos receive compensation for their injuries, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4       (a) SHORT TITLE.—This Act may be cited as the  
5       “Asbestos Claims Criteria and Compensation Act of  
6       2003”.

1 (b) TABLE OF CONTENTS.—The table of contents is  
 2 as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Findings and purposes.
- Sec. 3. Definitions.
- Sec. 4. Physical impairment.
- Sec. 5. Procedures; removal.
- Sec. 6. Statute of limitations; two-disease rule.
- Sec. 7. Miscellaneous provisions.
- Sec. 8. Effective date.

3 **SEC. 2. FINDINGS AND PURPOSES.**

4 (a) FINDINGS.—Congress finds that—

5 (1) asbestos is a mineral that was widely used  
 6 before the 1980s for insulation, fireproofing, and  
 7 other purposes;

8 (2) millions of American workers and others  
 9 were significantly exposed to asbestos, especially  
 10 during and after World War II and before the ad-  
 11 vent of regulation by the Occupational Safety and  
 12 Health Administration in the early 1970s;

13 (3) exposure to asbestos has been associated  
 14 with various types of cancer, including mesothelioma  
 15 and lung cancer, and such nonmalignant conditions  
 16 as asbestosis, pleural plaques, and diffuse pleural  
 17 thickening;

18 (4) the diseases caused by asbestos have latency  
 19 periods of up to 40 years or more, but the most seri-  
 20 ous asbestos-related disease, mesothelioma, is fatal

1 within 1 to 2 years, and other related cancers are  
2 often fatal;

3 (5) although the use of asbestos has dramati-  
4 cally declined since 1980 and workplace exposures  
5 have been regulated since 1971 by the Occupational  
6 Safety and Health Administration, past exposures  
7 will continue to result in significant death and dis-  
8 ability from mesothelioma and other cancers well  
9 into the 21st century;

10 (6) exposure to asbestos has created a flood of  
11 litigation targeting approximately 8,400 defendant  
12 companies in Federal and State courts that the  
13 United States Supreme Court has characterized as  
14 “an elephantine mass” of cases that “defies cus-  
15 tomary judicial administration and calls for national  
16 legislation,” *Ortiz v. Fibreboard Corporation*, 119 S.  
17 Ct. 2295, 2302 (1999);

18 (7) the American Bar Association supports en-  
19 actment of Federal legislation that would—

20 (A) allow persons alleging non-malignant  
21 asbestos-related disease claims to file a cause of  
22 action in Federal or State court only if those  
23 persons meet the medical criteria in the “ABA  
24 Standard for Non-Malignant Asbestos-Related

1           Disease Claims’’ dated February 2003 or an  
2           appropriate similar medical standard; and

3           (B) toll all applicable statutes of limita-  
4           tions until such time as the medical criteria in  
5           such standard are met;

6           (8) asbestos personal injury litigation can be  
7           unfair and inefficient, imposing a severe burden on  
8           litigants and taxpayers alike, in most cases involving  
9           defendant companies that were never involved in the  
10          production of asbestos;

11          (9) the extraordinary volume of nonmalignant  
12          asbestos cases continues to strain Federal and State  
13          courts, with over 200,000 cases pending and over  
14          50,000 new cases filed each year;

15          (10) asbestos personal injury litigation has al-  
16          ready contributed to the bankruptcy of more than  
17          60 companies and the rate of asbestos-driven bank-  
18          ruptcies is accelerating;

19          (11) the vast majority of asbestos claims are  
20          filed by individuals who—

21               (A) have been exposed to asbestos;

22               (B) may have some physical sign of expo-  
23               sure; and

24               (C) suffer no present asbestos-related im-  
25               pairment;

1           (12) the cost of compensating exposed persons  
2       who are not sick—

3           (A) jeopardizes the ability of defendants to  
4       compensate people with cancer and other seri-  
5       ous asbestos-related diseases, now and in the  
6       future; and

7           (B) strains the ability of courts to manage  
8       the deluge of cases involving nonimpaired plain-  
9       tiffs;

10          (13) an estimated 50,000 to 60,000 workers  
11       have lost their jobs as a direct result of asbestos liti-  
12       gation and related bankruptcies of defendant compa-  
13       nies and each displaced worker will, on average, lose  
14       between \$25,000 and \$50,000 in lost wages;

15          (14) employees of defendant companies declar-  
16       ing bankruptcy (who are often stockholders of those  
17       companies) will, on average, lose 25 percent of the  
18       value of their retirement investment under section  
19       401(k) of the Internal Revenue Code of 1986 be-  
20       cause of lost stock value;

21          (15) concerns about statutes of limitations can  
22       force claimants who have been exposed to asbestos  
23       but who have no current injury to bring premature  
24       lawsuits in order to protect against losing their

1 rights to future compensation should those claimants  
2 become impaired;

3 (16) consolidations, joinder, and similar proce-  
4 dures, to which some courts have resorted in order  
5 to deal with the mass of asbestos cases, can under-  
6 mine the appropriate functioning of the judicial  
7 process and encourage the filing of thousands of  
8 cases by exposed persons who are not yet sick and  
9 who may never become sick;

10 (17) the availability of sympathetic forums in  
11 States with no connection to the plaintiff or to the  
12 exposures that form the basis of a lawsuit has en-  
13 couraged the filing of thousands of cases on behalf  
14 of exposed persons who are not yet sick and may  
15 never become sick;

16 (18) asbestos litigation, if left unchecked by  
17 reasonable congressional intervention, will—

18 (A) continue to inhibit the economy and  
19 run counter to plans to stimulate economic  
20 growth and the creation of new jobs;

21 (B) threaten the savings, retirement bene-  
22 fits, and employment of defendants' current  
23 and retired employees;

24 (C) affect adversely the communities in  
25 which these defendants operate; and

1 (D) impair interstate commerce and na-  
2 tional initiatives, including national security;  
3 and

4 (19) the public interest and the interest of  
5 interstate commerce requires deferring the claims of  
6 exposed persons who are not sick in order to—

7 (A) preserve, now and for the future, de-  
8 fendants' ability to compensate people who de-  
9 velop cancer and other serious asbestos-related  
10 injuries; and

11 (B) safeguard the jobs, benefits, and sav-  
12 ings of American workers and the well-being of  
13 the national economy.

14 (b) PURPOSES.—It is the purpose of this Act to—

15 (1) give priority to those asbestos claimants  
16 who can demonstrate actual physical harm or illness  
17 caused by asbestos;

18 (2) fully preserve the rights of claimants who  
19 were exposed to asbestos to pursue compensation  
20 should those claimants become sick in the future;

21 (3) enhance the ability of the Federal and State  
22 judicial systems to supervise and control asbestos  
23 litigation and asbestos-related bankruptcy pro-  
24 ceedings; and

1           (4) conserve the scarce resources of the defend-  
 2           ants, and marshal assets in bankruptcy, to allow  
 3           compensation of cancer victims and others who are  
 4           physically harmed by exposure to asbestos while se-  
 5           curing the right to similar compensation for those  
 6           who may suffer physical harm in the future.

7 **SEC. 3. DEFINITIONS.**

8           In this Act:

9           (1) AMA GUIDES TO THE EVALUATION OF PER-  
 10          MANENT IMPAIRMENT.—The term “AMA Guides to  
 11          the Evaluation of Permanent Impairment” means  
 12          the American Medical Association’s Guides to the  
 13          Evaluation of Permanent Impairment (Fifth Edition  
 14          2000).

15          (2) ASBESTOS.—The term “asbestos” includes  
 16          all minerals defined as “asbestos” under section  
 17          1910 of title 29 of the Code of Federal Regulations.

18          (3) ASBESTOS CLAIM.—The term “asbestos  
 19          claim”—

20                (A) means any claim for damages or other  
 21                relief presented in a civil action or bankruptcy  
 22                proceeding, arising out of, based on, or related  
 23                to the health effects of exposure to asbestos, in-  
 24                cluding loss of consortium and any other deriv-  
 25                ative claim made by or on behalf of any exposed



1 person or any representative, spouse, parent,  
 2 child or other relative of any exposed person;  
 3 and

4 (B) does not include claims for benefits  
 5 under a workers' compensation law or veterans'  
 6 benefits program, or claims brought by any per-  
 7 son as a subrogee by virtue of the payment of  
 8 benefits under a workers' compensation law.

9 (4) ASBESTOSIS.—The term “asbestosis”  
 10 means bilateral diffuse interstitial fibrosis of the  
 11 lungs caused by inhalation of asbestos fibers.

12 (5) CERTIFIED B-READER.—The term “cer-  
 13 tified B-reader” means an individual qualified as a  
 14 “final” or “B-reader” under section 37.51(b) of title  
 15 42 of the Code of Federal Regulations.

16 (6) CIVIL ACTION.—The term “civil action”—  
 17 (A) means all suits of a civil nature in  
 18 Federal or State court, whether cognizable as  
 19 cases at law or in equity or in admiralty; and

20 (B) does not include an action relating to  
 21 any workers' compensation law, or a proceeding  
 22 for benefits under any veterans' benefits pro-  
 23 gram.

24 (7) EXPOSED PERSON.—The term “exposed  
 25 person” means any person whose exposure to asbes-

1       tos or to asbestos-containing products is the basis  
2       for an asbestos claim.

3           (8) FEV1.—The term “FEV1” means forced  
4       expiratory volume in the first second, which is the  
5       maximal volume of air expelled in 1 second during  
6       performance of simple spirometric tests.

7           (9) FVC.—The term “FVC” means forced vital  
8       capacity, which is the maximal volume of air expired  
9       with maximum effort from a position of full inspira-  
10      tion.

11          (10) ILO SCALE.—The term “ILO Scale”  
12      means the system for the classification of chest x-  
13      rays set forth in the International Labour Office’s  
14      Guidelines for the Use of ILO International Classi-  
15      fication of Radiographs of Pneumoconioses (1980)  
16      as amended by the International Labour Office.

17          (11) NONMALIGNANT CONDITION.—The term  
18      “nonmalignant condition” means any condition that  
19      is caused or may be caused by asbestos other than  
20      a diagnosed cancer.

21          (12) PATHOLOGICAL EVIDENCE OF ASBES-  
22      TOSIS.—The term “pathological evidence of asbes-  
23      tosis” means a statement by a Board-certified pa-  
24      thologist that—

1 (A) more than 1 representative section of  
2 lung tissue uninvolved with any other disease  
3 process demonstrates a pattern of  
4 peribronchiolar or parenchymal scarring in the  
5 presence of characteristic asbestos bodies; and

6 (B) there is no other more likely expla-  
7 nation for the presence of the fibrosis.

8 (13) PREDICTED LOWER LIMIT OF NORMAL.—

9 The term “predicted lower limit of normal” for any  
10 test means the fifth percentile of healthy populations  
11 based on age, height, and gender, as referenced in  
12 the AMA Guides to the Evaluation of Permanent  
13 Impairment.

14 (14) RADIOLOGICAL EVIDENCE OF ASBES-  
15 TOSIS.—The term “radiological evidence of asbes-  
16 tosis” means a chest x-ray showing small, irregular  
17 opacities (s,t) graded by a certified B-reader as at  
18 least 1/1 on the ILO scale.

19 (15) RADIOLOGICAL EVIDENCE OF DIFFUSE  
20 PLEURAL THICKENING.—The term “radiological evi-  
21 dence of diffuse pleural thickening” means a chest  
22 x-ray showing bilateral pleural thickening of at least  
23 B2 on the ILO scale and blunting of at least 1  
24 costophrenic angle.

1           (16) STATE.—The term “State” means any  
 2       State of the United States, the District of Columbia,  
 3       Commonwealth of Puerto Rico, the Northern Mar-  
 4       iana Islands, the Virgin Islands, Guam, American  
 5       Samoa, and any other territory or possession of the  
 6       United States or any political subdivision of any of  
 7       the entities under this paragraph.

8           (17) VETERANS’ BENEFITS PROGRAM.—The  
 9       term “veterans’ benefits program” means any pro-  
 10      gram for benefits in connection with military service  
 11      administered by the Veterans’ Administration under  
 12      title 38, United States Code.

13          (18) WORKERS’ COMPENSATION LAW.—The  
 14      term “workers’ compensation law”—

15           (A) means a law respecting a program ad-  
 16      ministered by a State or the United States to  
 17      provide benefits, funded by a responsible em-  
 18      ployer or an insurance carrier of that employer,  
 19      for occupational diseases or injuries or for dis-  
 20      ability or death caused by occupational diseases  
 21      or injuries;

22           (B) includes the Longshore and Harbor  
 23      Workers’ Compensation Act (33 U.S.C. 901 et  
 24      seq.) and chapter 81 of title 5, United States  
 25      Code; and

1 (C) does not include the Federal Employ-  
2 er's Liability Act (45 U.S.C. 51 et seq.).

3 **SEC. 4. PHYSICAL IMPAIRMENT.**

4 (a) IMPAIRMENT ESSENTIAL ELEMENT OF CLAIM.—  
5 Physical impairment of the exposed person, to which as-  
6 bestos exposure was a substantial contributing factor,  
7 shall be an essential element of an asbestos claim. For  
8 purposes of this section, cancer shall be presumed to in-  
9 volve physical impairment.

10 (b) PRIMA FACIE EVIDENCE OF PHYSICAL IMPAIR-  
11 MENT.—

12 (1) IN GENERAL.—No person shall bring or  
13 maintain a civil action alleging a nonmalignant as-  
14 bestos claim in the absence of a prima facie showing  
15 of physical impairment as a result of a medical con-  
16 dition to which exposure to asbestos was a substan-  
17 tial contributing factor.

18 (2) REQUIREMENTS OF PRIMA FACIE SHOW-  
19 ING.—A prima facie showing under this subsection  
20 shall include all of the following minimum require-  
21 ments:

22 (A) PERMANENT RESPIRATORY IMPAIR-  
23 MENT RATING.—A determination by a qualified  
24 physician, on the basis of a medical examina-  
25 tion and pulmonary function testing, that the

1 exposed person has a permanent respiratory im-  
2 pairment rating of at least Class 2 as defined  
3 by and evaluated under the AMA Guides to the  
4 Evaluation of Permanent Impairment.

5 (B) DIAGNOSIS.—A diagnosis by a quali-  
6 fied physician of asbestosis or diffuse pleural  
7 thickening, based at a minimum on pathological  
8 evidence of asbestosis, radiological evidence of  
9 asbestosis, or radiological evidence of diffuse  
10 pleural thickening.

11 (C) SUBSTANTIAL CONTRIBUTING FAC-  
12 TOR.—A determination by a qualified physician  
13 that asbestosis or diffuse pleural thickening  
14 (rather than solely chronic obstructive pul-  
15 monary disease) is a substantial contributing  
16 factor to the exposed person's physical impair-  
17 ment, based at a minimum on a determination  
18 that the exposed person has either—

19 (i) a ratio of FEV1 to FVC that is  
20 equal to or greater than the predicted  
21 lower limit of normal; or

22 (ii) a chest x-ray showing small, irreg-  
23 ular opacities (s,t) graded by a certified B-  
24 reader at least 2/1 on the ILO scale.

25 (c) COMPLIANCE WITH TECHNICAL STANDARDS.—

1           (1) IN GENERAL.—Evidence relating to physical  
 2           impairment under this section, including pulmonary  
 3           function testing and diffusing studies, shall comply  
 4           with—

5                   (A) the technical recommendations for ex-  
 6                   aminations, testing procedures, quality assur-  
 7                   ance and quality control, and equipment of the  
 8                   AMA Guides to the Evaluation of Permanent  
 9                   Impairment; or

10                   (B) if the AMA Guides to the Evaluation  
 11                   of Permanent Impairment are not applicable,  
 12                   other authoritative standards.

13           (2) ADJUSTMENTS.—No adjustments with re-  
 14           spect to pulmonary function testing shall be made on  
 15           the basis of race.

16           (d) NO PRESUMPTION AT TRIAL.—Presentation of  
 17           prima facie evidence of asbestos-related impairment meet-  
 18           ing the requirements of this section shall not result in any  
 19           presumption at trial that the exposed person is impaired  
 20           by an asbestos-related condition, and evidence that the ex-  
 21           posed person made a prima facie showing of impairment  
 22           shall not be admissible at trial.

23   **SEC. 5. PROCEDURES; REMOVAL.**

24           (a) CONSOLIDATION.—A court may consolidate for  
 25           trial any number and type of asbestos claims with consent

1 of all the parties. In the absence of such consent, the court  
 2 may consolidate for trial only asbestos claims relating to  
 3 the same exposed person and members of the household  
 4 of the exposed person.

5 (b) VENUE.—

6 (1) IN GENERAL.—A civil action asserting an  
 7 asbestos claim may only be brought in the State of  
 8 the plaintiff's domicile or a State in which there oc-  
 9 curred exposure to asbestos that is a substantial  
 10 contributing factor to the physical impairment on  
 11 which the claim is based.

12 (2) INAPPLICABILITY.—Paragraph (1) shall not  
 13 apply to a claim that—

14 (A) is based upon an exposed person's can-  
 15 cer; and

16 (B) is filed by an exposed person who is di-  
 17 agnosed with fatal mesothelioma or other asbes-  
 18 tos-related cancer by a qualified physician, re-  
 19 sulting in a short life expectancy of less than 3  
 20 years after the date on which the claim is filed.

21 (c) PRELIMINARY PROCEEDINGS.—The plaintiff in  
 22 any civil action involving an asbestos claim shall file with  
 23 the complaint or other initial pleading a written report and  
 24 supporting test results constituting prima facie evidence  
 25 of the exposed person's asbestos-related impairment meet-



1 ing the requirements of section 4(b). The defendant shall  
2 be afforded a reasonable opportunity to challenge the ade-  
3 quacy of the proffered prima facie evidence of asbestos-  
4 related impairment. The plaintiff's claim shall be dis-  
5 missed without prejudice upon a finding of failure to make  
6 the required prima facie showing.

7 (d) REMOVAL.—

8 (1) IN GENERAL.—If a State court refuses or  
9 fails to apply this section, any party in a civil action  
10 for an asbestos claim may remove such action to a  
11 district court of the United States in accordance  
12 with chapter 89 of title 28, United States Code.

13 (2) JURISDICTION OVER REMOVED ACTIONS.—  
14 The district courts of the United States shall have  
15 jurisdiction of all civil actions removed under this  
16 subsection, without regard to the amount in con-  
17 troversy and without regard to the citizenship or res-  
18 idence of the parties.

19 (3) REMOVAL BY ANY DEFENDANT.—A civil ac-  
20 tion may be removed to the district court of the  
21 United States under this subsection by any defend-  
22 ant without the consent of all defendants.

23 (4) REMAND.—The district court shall remand  
24 any civil action removed solely under this subsection,  
25 unless the court finds that—

1 (A) the State court failed to comply with  
2 procedures prescribed by law; or

3 (B) the failure to dismiss by the State  
4 court lacked substantial support in the record  
5 before the State court.

6 **SEC. 6. STATUTE OF LIMITATIONS; TWO-DISEASE RULE.**

7 (a) STATUTE OF LIMITATIONS.—Notwithstanding  
8 any other provision of law, with respect to any nonmalig-  
9 nant asbestos claim not barred on the effective date of  
10 this Act, the limitations period shall not begin to run until  
11 the exposed person discovers, or through the exercise of  
12 reasonable diligence should have discovered, that the ex-  
13 posed person is physically impaired by an asbestos-related  
14 nonmalignant condition.

15 (b) TWO-DISEASE RULE.—An asbestos claim arising  
16 out of a nonmalignant condition shall be a distinct cause  
17 of action from an asbestos claim relating to the same ex-  
18 posed person arising out of asbestos-related cancer. No  
19 damages shall be awarded for fear or risk of cancer in  
20 any civil action asserting only a nonmalignant asbestos  
21 claim.

22 (c) GENERAL RELEASES FROM LIABILITY PROHIB-  
23 ITED.—No settlement of a nonmalignant asbestos claim  
24 concluded after the date of enactment of this Act shall

1 require, as a condition of settlement, release of any future  
 2 claim for asbestos-related cancer.

3 **SEC. 7. MISCELLANEOUS PROVISIONS.**

4 (a) CONSTRUCTION WITH OTHER LAWS.—This Act  
 5 shall not be construed to—

6 (1) affect the scope or operation of any work-  
 7 ers' compensation law or veterans' benefit program;

8 (2) affect the exclusive remedy or subrogation  
 9 provisions of any such law; or

10 (3) authorize any lawsuit which is barred by  
 11 any such provision of law.

12 (b) CONSTITUTIONAL AUTHORITY.—The Constitu-  
 13 tional authority for this Act is contained in Article I, sec-  
 14 tion 8, clause 3 and Article III, section 1 of the Constitu-  
 15 tion of the United States.

16 **SEC. 8. EFFECTIVE DATE.**

17 This Act shall take effect on the date of enactment  
 18 of this Act and apply to any civil action asserting an asbes-  
 19 tos claim in which trial has not commenced as of that  
 20 date.

○